APPEAL NO. 010771

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on March 13, 2001. With regard to the two issues before her, the hearing officer determined that the appellant's (claimant) compensable (low back) injury of _____, does not include an injury to the right shoulder, right elbow, neck, and a heart attack; and that the claimant is not entitled to supplemental income benefits (SIBs) for the third and fourth quarters.

The claimant appealed, reiterating much of her testimony from the CCH along with additional information and alleging inaccuracies ("lies") in various medical reports which conflicted with her views. The respondent (carrier) responded, urging affirmance.

DECISION

Affirmed.

Attached to the claimant's appeal are some 67 pages of miscellaneous records, only one of which, a Result of Spinal Surgery Second Opinion Process, dated March 23, 2001, appears to have been generated after the CCH. Several of the other records were duplicates of exhibits admitted at the CCH and others appear to be records exchanged by the carrier. We further note that many of the records have handwritten notations that various doctors lied. We normally do not consider information which is submitted for the first time on appeal and our review of these records does not indicate how those records not admitted at the CCH probably resulted in an erroneous decision by the hearing officer. Hernandez v. Hernandez, 611 S.W.2d 732 (Tex. Civ. App.-San Antonio 1981, no writ).

The claimant was employed as a "head chef on the line" and sustained a compensable injury in a slip-and-fall on _____. The mechanics of the fall and extent of injuries are in dispute. The carrier apparently accepted liability for a low back injury. Another CCH, where the hearing officer's decision was affirmed in Texas Workers' Compensation Commission Appeal No. 002225, decided November 8, 2000, determined that the compensable injury did not extend to a bilateral carpal tunnel syndrome (CTS) injury and that the claimant was not entitled to SIBs for the first and second quarters. The claimant has had a variety of doctors and testified that from January 4 through July 4, 2000, her treating doctor was Dr. R. Dr. M, a chiropractor, had apparently treated the claimant in 1997 and the claimant again began treating with Dr. M in August 2000.

Extent of Injury

Dr. M testified at the CCH that the claimant's right shoulder, right elbow, and neck complaints were part of the 1996 fall injury. How this is so is not explained; Dr. M only testified:

> In my review of the records, I have found that a preponderance of the evidence that this case since 1996 has included the cervical spine, cervical fragile syndrome, right shoulder strain/sprain, right elbow strain and right wrist [CTS].

(As previously mentioned, the allegations of a CTS injury were resolved in Appeal No. 002225, *supra*.) The carrier contends that earlier medical reports (not referenced) did not include right shoulder, elbow, or neck complaints and that the claimant had previously had right shoulder and arm complaints due to a 1994 injury.

Regarding the alleged heart attack, the claimant contends that the carrier denied payment for certain prescriptions, which led to raised blood pressure, which in turn caused a heart attack, which was discovered during a screening examination for CTS surgery in July 2000. Dr. S, a cardiologist, in a report of September 22, 2000, found no evidence of coronary heart disease and suggested that the "ECG changes are secondary to hypertensive heart syndrome." The claimant has a 30-year history of smoking and familial history of heart disease. The extent of the claimant's smoking is disputed but the claimant admits to at least some continued tobacco use.

The hearing officer summarizes the medical evidence in his Statement of the Evidence and comments that there is insufficient "evidence, particularly medical evidence" that the compensable injury includes the right shoulder, right elbow, neck, or a heart attack. Those determinations are supported by the evidence and are not so against the great weight and preponderance of the evidence to require reversal.

SIBs

The claimant appears to argue that her entitlement to SIBs is based on a hybrid theory of a total inability to work and enrollment in some kind of vocational rehabilitation program (VRP). The parties stipulated to a compensable injury, 15% or greater impairment rating, and the SIBs quarters. Not stipulated or specifically mentioned in the hearing officer's decision are the qualifying periods. The claimant testified without contradiction that the "qualifying period for the fourth quarter is April 5th of 2000 through July 3rd." The criteria for entitlement to SIBs is set forth in Sections 408.142(a) and 408.143.

First, addressing the total inability to work, the law regarding SIBs, good faith, and an assertion that there was no ability to work at all during the qualifying period is discussed in Texas Workers' Compensation Commission Appeal No. 000004, decided February 15, 2000. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102(d)(4) (Rule 130.102(d)(4)) provides that an employee may be in good faith if the employee: (1) has been unable to perform any type of work in any capacity, (2) has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and (3) no other records show that the injured employee is able to return to work. The hearing officer found that during the qualifying periods at issue, the claimant had some ability to work and there was no narrative which "specifically explained how Claimant's injury caused a total inability

to work." Dr. M only testified that her review of the records found no release to return to work and no functional capacity evaluation. Dr. M just says that the claimant cannot work. The carrier points to a report dated June 12, 1999, from Dr. L, which states that the claimant "could perform at least a sedentary/light duty status."

Regarding the VRP with the Texas Rehabilitation Commission (TRC), the claimant offered into evidence various documents showing appointments with TRC personnel in November/December 1999 and May/June 2000. Also in evidence is an Individualized Plan for Employment (IPE) from the TRC. However, the IPE appears to be unsigned and is dated July 31, 2000, some four weeks after the end of the fourth quarter qualifying period. The hearing officer commented that the claimant "was neither enrolled nor did she participate in a [VRP] during the qualifying periods for the 3rd and 4th quarters." The hearing officer determined that the claimant had not sustained her burden to prove entitlement to SIBs.

The hearing officer's decision is supported by the evidence and is not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951). Accordingly, the hearing officer's decision and order are affirmed.

Thomas A. Knapp
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge